DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 04-20120031
Sales/Use Tax
For Tax Years 2008, 2009, and 2010

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ISSUE

I. Sales/Use Tax – Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); 45 IAC 2.2-1-1; 45 IAC 2.2-4-1; 45 IAC 2.2-4-2.

Taxpayer protests the proposed assessments, claiming it was not responsible for some of the sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana company, which provides landscape, lawn care, and related maintenance services in the spring, summer, and fall. In the winter, Taxpayer does snow plowing and ice removal.

In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer for 2008 through 2010 tax years. Pursuant to the audit, the Department determined that Taxpayer did not collect and remit sales tax on certain retail transactions for the years at issue. The Department's audit also determined that Taxpayer did not pay sales tax or self-assess and remit use tax on certain purchases of tangible personal property, which Taxpayer used for its business. Additionally, the audit determined that Taxpayer was allowed some credits for sales tax which it mistakenly paid at the time of its purchases.

Taxpayer only protested the assessment on "salt applications," which were part of Taxpayer's "ice removal" service offered to its customers. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales/Use Tax – Imposition.

DISCUSSION

The Department's audit assessed sales tax on "salt applications" on the ground that the transactions were "unitary transactions." The audit noted that:

> During the winter months [Taxpayer] applies salt to customers' roads, sidewalks, and parking lots. [Taxpayer charges] one price for this transaction, separating on the invoice amounts for snow plowing. Some invoices read "shovel and salt". When a combined, single charge for material and labor is invoiced as one amount this is considered a unitary transaction which is subject to sales tax. For a salt spreading application... the salt cannot be purchased separately from the company and applied by the customer. The company only does the application, so the labor and material are indivisible. Because the salt is not transferred until it is applied, the application charges must be included in one retail price. This gross retail income is therefore subject to sales tax.

Taxpayer, to the contrary, claimed that it simply performed "ice removal" services. Thus, as services, those transactions are not subject to sales tax pursuant to 45 IAC 2.2-4-2.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of

Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Id. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

IC § 6-2.5-1-1(a), in pertinent part, defines:

"Unitary transaction" includes **all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated**. (**Emphasis added**).

45 IAC 2.2-1-1(a) explains:

Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. **A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price**. (**Emphasis added**).

IC § 6-2.5-2-1 provides:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-4-1, in relevant part, states:

(a) A person is a retail merchant making a retail transaction when he engages in selling at retail.

(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another person for consideration.

(c) For purposes of determining what constitutes selling at retail, it does not matter whether:

(1) the property is transferred in the same form as when it was acquired;

(2) the property is transferred alone or in conjunction with other property or services; or

(3) the property is transferred conditionally or otherwise.

45 IAC 2.2-4-1 explains:

(a) **Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail** unless the seller is not acting as a "retail merchant".

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:

(1) The price arrived at between purchaser and seller.

(2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer.

(3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

45 IAC 2.2-4-2 states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. **Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail** unless:

(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;

(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;

(3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; and

(4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) **A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold**

by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction. (**Emphasis added**).

In this instance, Taxpayer offers "snow plowing" and "ice removal" in winter. To ensure the complete removal of ice, it applies salt to remove the ice on the ground. Thus, in conjunction with rendering services, Taxpayer also transfers tangible personal property for a consideration. Pursuant to the above mentioned statutes and regulations, Taxpayer is a retail merchant and should have collected and remitted sales tax on the retail transactions.

At the hearing, Taxpayer argued that it primarily provides non-taxable services. Taxpayer asserted that it has two categories of customers. The first category of customers supplies salt/sand and Taxpayer only provides labor. The second category of customers do not supply salt/sand; rather, they pay Taxpayer to plow snow and also remove ice using Taxpayer's materials when needed. Thus, the customers who supply salt to Taxpayer paid Taxpayer by the hour for labor only; for the customers in the second category, Taxpayer charged them one price per visit for ice removal which included both labor and materials (salt). Referring to 45 IAC 2.2-4-2, Taxpayer maintained that it performed services based on customers' specifications. Specifically, Taxpayer asserted that even if it transferred the tangible personal property to its customers when performing the "ice removal," its "ice removal" satisfies the four requirements outlined in 45 IAC 2.2-4-2(a) and thus its "ice removal" is not subject to sales tax. To support its protest, Taxpayer provides additional documentation, including sample contracts and invoices, sample purchase invoices of salt, and a summary of cost of sales for 2012 tax year.

For the first category of customers who supplied salt/sand to Taxpayer, the Department agrees that Taxpayer has provided sufficient documentation to demonstrate that it simply performed non-taxable services. No tangible personal property is transferred as a result. Thus, Taxpayer's protest of the assessment concerning the first category of customers is sustained.

As to the second category of customers, however, Taxpayer's documentation is not sufficient to demonstrate that it satisfies the four requirements outlined in 45 IAC 2.2-4-2(a). Specifically, Taxpayer's contracts and invoices contained two separate line items – Snow Plowing and Ice Removal (including salt). Taxpayer's invoices clearly state that ice removal including salt, which is tangible personal property. Thus, the audit correctly concluded that ice removal is a unitary transaction pursuant to IC § 6-2.5-1-1(a) and 45 IAC 2.2-1-1(a). Taxpayer argued that 45 IAC 2.2-4-2(a) should apply but it did not illustrate the application. Specifically, Taxpayer's documentation fails to show that the charge of salt is less than 10 percent compared with the service charge. Thus, in the absence of other supporting documentation, the Department is not able to agree with Taxpayer that ice removal is a non-taxable service.

FINDING

Taxpayer's protest is sustained in part and denied in part. The Department will recalculate Taxpayer's tax liabilities in a supplemental audit.

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